STATE OF MICHIGAN

COURT OF APPEALS

CAROL KRUSCHKE,

Plaintiff-Appellant,

v

JAMES R. LOVELL, M.D., and JAMES R. LOVELL, M.D., P.C.,

Defendants-Appellees.

UNPUBLISHED
November 3, 2005

No. 259601
Marquette Circuit Court
LC No. 03-040879-NH

Before: O'Connell, P.J., and Sawyer and Murphy, JJ.

O'CONNELL, P.J. (*dissenting*).

Plaintiff had reason to know of a possible cause of action immediately following her surgery, so she did not "discover" her cause of action later. "Once a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action." *Moll v Abbot Laboratories*, 444 Mich 1, 24; 506 NW2d 816 (1993). Because plaintiff was aware of her possible cause of action more than two years before she filed suit, I respectfully dissent.[1]

Complaining of extreme pain in her lower abdomen, plaintiff went to the emergency room of Marquette General Hospital in April 1998 and was treated by defendant James Lovell, M.D. Plaintiff was admitted into the hospital that night. The following day, Dr. Lovell performed a laparoscopy and found what he described as a "huge" cyst on plaintiff's left ovary that was "very extensively involved with endometriosis." Dr. Lovell then removed plaintiff's fallopian tubes, ovaries, uterus, and cervix. Plaintiff testified that after the surgery she was shocked and angry that a hysterectomy had been performed. She further testified that she was aware that Dr. Lovell had taken her ovaries and her uterus, and that she was appalled, disappointed, and frustrated with that outcome.[2]

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[1] Based upon the majority opinion's reasoning, a plaintiff who is aware of an injury, its source, and its peculiar circumstances could wait twenty-five years or indefinitely before bringing a lawsuit. The majority opinion effectively renders the statute of limitations meaningless.

[2] I concur with the trial court that when plaintiff left the hospital she was aware of her injury, she was aware of who caused the injury, and she was shocked at the outcome of the surgery. With
(continued…)

In September 2001, plaintiff moved to Ohio. On October 4, 2002, plaintiff visited a doctor there, and was told that, in the doctor's opinion, the hysterectomy Dr. Lovell performed was not medically necessary. Plaintiff filed her notice of intent to file a medical malpractice action on April 3, 2003, five years after the alleged injury, and her complaint was filed on September 8, 2003.

The statute of limitations for medical malpractice actions is two years from when the claim accrued, or within six months after the plaintiff first discovers or should have discovered the claim. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 219; 561 NW2d 843 (1997); MCL 600.5838a(3); MCL 600.5805(6). It is undisputed that plaintiff did not file her claim within the two-year limitations period. Therefore, plaintiff must show that her complaint is saved by the discovery rule. MCL 600.5838a(3). An objective standard is applied to determine when a plaintiff should have discovered a possible cause of action. *Solowy*, *supra* at 221. "[T]he discovery period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action." *Id*. at 222. To reiterate, a patient is considered aware of a possible cause of action as soon as she "is aware of an injury and its possible cause." *Moll*, *supra*. The majority takes the time to acknowledge this as the Supreme Court's current discovery standard and then expends great effort explaining how outdated opinions from our Court require us to apply a conflicting standard and reach a contrary result.[3]

Plaintiff had reason to know, based on the objective facts available to her, that she had a possible cause of action shortly after her surgery in 1998. At that point in time, plaintiff was aware of her injuries and that the cause of these injuries was the surgery performed by Dr. Lovell. Plaintiff testified that after the surgery she was shocked and angry at the result, but she did not take any action to pursue a claim. The discovery rule does not allow a plaintiff "to hold a matter in abeyance indefinitely while a plaintiff seeks professional assistance to determine the existence of a claim." *Turner v Mercy Hosps*, 210 Mich App 345, 353; 533 NW2d 365 (1995). Additionally, "[a] plaintiff must act diligently to discover a possible cause of action and 'cannot

(…continued)

this knowledge in hand, it is incumbent upon plaintiff to take action to avoid the consequences of the statute of limitations.

[3] Specifically, the current standard conflicts with the notion of discovery adopted in the pre-*Moll* Court of Appeals decisions of *Leary v Rupp*, 89 Mich App 145; 280 NW2d 466 (1979); *Jackson v Vincent*, 97 Mich App 568; 296 NW2d 104 (1980); and *Pendell v Jarka*, 156 Mich App 405; 402 NW2d 23 (1986), but those decisions have questionable validity after *Solowy* and tenuous applicability to the case at bar. While I agree with these opinions that what is now the *Moll* standard tends to foster an unhealthy (and certainly overly litigious) skepticism and distrust in patients, the patient in this case undisputedly felt shock, frustration, and anger at the unanticipated results of her surgery. Nevertheless, the current, valid standard from *Moll* and *Solowy* did not add enough fuel to her fires of indignation to urge her to act immediately and get a second opinion. Therefore, it is unlikely that taking recourse to now-defunct standards such as *Pendell's* "last-date-of-treatment" rule would apply in this case or serve any legitimate policy purpose. See *Morgan v Taylor*, 434 Mich 180; 451 NW2d 852 (1990). Nevertheless, the majority carefully ignores all the developments that have affected this area of law over the last decade so that it may avoid the hard task of implementing the policy preference of our Supreme Court and Legislature.

simply sit back and wait for others' to inform her of its existence." *Id*., quoting *Grimm v Ford Motor Co*, 157 Mich App 633, 639; 403 NW2d 482 (1986). Plaintiff did not act quickly to discover whether her injuries resulted from defendants' fault, even though her injuries were disclosed to her and were more extensive than she anticipated.[4] Therefore, the trial court correctly determined that the discovery rule did not toll the limitations period and that the period expired. However deeply the majority may dig for its precedents, this is the result that straightforward application of the undisputed standard yields.[5] I would affirm.

/s/ Peter D. O'Connell

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[4] I understand that the discovery rule places medical malpractice plaintiffs in the awkward position of second-guessing their doctors' actions soon after they discover the source of their injuries, but holding otherwise would allow a plaintiff to delay action until they find a doctor who holds a conflicting opinion of what medical action was necessary or proper under plaintiff's original circumstances. Of course, if plaintiff had presented an issue of outright fraud, this case would present an entirely different issue. MCL 600.5855.

[5] The majority opinion announces one standard and applies another. It applies a standard that walks, talks, and acts like the outmoded "last treatment" standard while wearing the majority's label of "reasonable notice." While I also sympathize with plaintiff, I feel compelled to do more than merely announce the correct standard. Therefore, I take the additional, apparently risky, step of actually applying it. Plaintiff was aware of her injury and was privy to information that would have persuaded a reasonable person that the totally unanticipated and drastic results of the surgery were *possibly* (not certainly, definitely, or even probably, but *possibly*) caused by her physician's error or omission. However, the majority concludes that plaintiff did not know for certain that the surgeon probably could have avoided removing her reproductive organs, so the statute of limitations stopped running until she found another doctor that disagreed with Dr. Lovell's actions.

I find it a bit disingenuous and condescending to presume that a modern woman would be too ignorant or obsequious to detect the possibility of wrongdoing in this case. Plaintiff visited her doctor for abdominal pain and was told, only after surgery, that total removal of her reproductive organs without her express consent was medically necessary. Undisputedly, the doctor informed plaintiff of the surgery's details, including the fact that the removed cyst only affected one of her ovaries; that the other ovary was only "superficially," however extensively, involved with endometriosis; and that her uterus and cervix were taken even though they appeared perfectly healthy. In the mind of a reasonable person, this information would have raised the possibility that the doctor went beyond what was "medically necessary," and knowledge of that possibility starts the clock ticking.